

MEMORANDUM

August 20, 2008

To: Docket UE-080111
From: Commission Staff

Re: Summary of Rulemaking Inquiry and Comments

On February 5, 2008, the Washington Utilities and Transportation Commission (Commission) filed with the Code Reviser a Preproposal Statement of Inquiry (CR-101) to adopt rules to implement the requirements of RCW 80.80.060 regarding electrical company compliance with the greenhouse gases emissions performance standard contained in RCW 80.80.040. The Commission is required by RCW 80.80.060(5), (8) and (9) to adopt rules by December 31, 2008. This memorandum provides background and summarizes the activity in this inquiry through June 2008.

BACKGROUND

On May 7, 2007, Governor Gregoire signed into law Engrossed Substitute Senate Bill 6001 (hereinafter SB6001). Among other things, the new statute establishes a greenhouse gas emissions performance standard (EPS) in RCW 80.80.040 and requires in RCW 80.80.060 the UTC to enforce the standard with respect to electrical companies. The EPS applies to long-term financial commitments that the statute defines as:

- (a) Either a new ownership interest in baseload electric generation or an upgrade to a baseload electric generation facility; or
- (b) A new or renewed contract for baseload electric generation with a term of five or more years for the provision of retail power or wholesale power to end-use customers in this state.

Baseload electric generation is defined as:

Electric generation from a power plant that is designed and intended to provide electricity at an annualized plant capacity factor of at least sixty percent.

And a power plant is defined as:

A facility for the generation of electricity that is permitted as a single plant by the energy facility site evaluation council or a local jurisdiction.

RCW 80.80.040(10) directs the Department of Ecology and the Energy Facility Site Evaluation Council to adopt rules necessary to implement and enforce the EPS by June, 30, 2008. However, RCW 80.80.060(8) directs the Commission to adopt rules for enforcement of the EPS with respect to jurisdictional electrical companies.

The Department of Ecology adopted rules at WAC 173-407 on June 19, 2008. EFSEC adopted rules at WAC 463-85 on June 24, 2008.

RCW 80.80.060(7) directs the Commission to “consult with the department to apply the procedures adopted by the department to verify the emissions of greenhouse gases from baseload electric generation under RCW [80.80.040](#).” The Department of Ecology is directed to “report to the commission whether baseload electric generation will comply with the greenhouse gases emissions performance standard for the duration of the period the baseload electric generation is supplied to the electrical company.”

RCW 80.80.060(5) provides that, outside of a general rate proceeding, an electrical company may apply to the Commission for determination of whether a long-term commitment complies with the EPS:

Upon application by an electrical company, the commission shall determine whether the company's proposed decision to acquire electric generation or enter into a power purchase agreement for electricity complies with the greenhouse gases emissions performance standard established under RCW [80.80.040](#), whether the company has a need for the resource, and whether the specific resource selected is appropriate.

The Commission is directed to adopt procedural rules for such a determination:

The commission shall adopt rules to provide that the schedule for a proceeding under this subsection takes into account both (a) the needs of the parties to the proposed resource acquisition or power purchase agreement for timely decisions that allow transactions to be completed; and (b) the procedural rights to be provided to parties in chapter [34.05](#) RCW (part IV), including intervention, discovery, briefing, and hearing.

RCW 80.80.060(8) directs the Commission to adopt rules for enforcement of the EPS with respect to jurisdictional electrical companies and specifically to adopt “procedural rules for approving costs incurred by an electrical company under subsection (4) of this section.” Subsection (4) of the section provides:

Upon application by an electric utility, the commission may provide a case-by-case exemption from the greenhouse gases emissions performance standard to

address: (a) Unanticipated electric system reliability needs; or (b) catastrophic events or threat of significant financial harm that may arise from unforeseen circumstances.

COMMISSION PROCESS

The Commission initiated its Rulemaking Inquiry on February 8, 2008, by issuing a Notice of Opportunity To File Written Comments. The Commission staff posted a discussion draft rule to which interested persons could direct their comments. Initial comments were due on March 31, 2008. The Commission received written comments from Puget Sound Energy, the Northwest Energy Coalition, and PacifiCorp.

SUMMARY OF INITIAL COMMENTS

Puget Sound Energy (PSE)

A. PSE recommends that two definitions be added.

Observing that the term “new ownership interest” is used within the term “long-term financial commitment,” but is not itself defined, PSE recommends the following.

"New ownership interest" means a change in the ownership structure of a baseload power plant or a cogeneration facility or the electrical generation portion of a cogeneration facility affecting at least fifty-one (51) percent or majority interest of the value of the power plant.

Noting that the Department of Ecology is proposing to include a definition for “electricity from unspecified sources,” PSE recommends that the Commission rule should include the same, or a similar definition.

“Electricity from unspecified sources” means electricity to be delivered pursuant to a long-term financial commitment whose sources or origins of generation and expected average annual deliveries of electricity cannot be ascertained with reasonable certainty.

B. PSE recommends that the Commission clarify two definitions.

PSE recommends that the Commission clarify that the term "energy facility site evaluation council" is a state-level agency of the State of Washington.

Similarly, PSE recommends that the Commission clarify that a "local jurisdiction" is a non-state agency in the State of Washington (such as a municipal corporation).

Specifically, PSE recommends the following clarification to the definition of “power plant”:

"Power plant" means a facility for the generation of electricity that is permitted as a single plant by the energy facility site evaluation council or a municipal corporation. "Energy facility site evaluation council" is a Washington State agency. "Municipal corporation" shall have the meaning as defined in RCW 35.58.020. "Local jurisdiction" shall have the meaning as defined in RCW 36.70C.020(2): “Local jurisdiction” means a county, city, or incorporated town.

- C. PSE recommends that the Commission remove the requirement that a utility include the expected cost of power generation from an application pursuant to WAC 480.100.XXX(2)(b)(iv) and (2)(c)(iv) because this requirement is unnecessary and confusing.*
- D. PSE recommends that the Commission clarify in its rules how it will consult with the Department of Ecology regarding compliance with the EPS.*
- E. PSE recommends that the Commission adopt rules for how costs will be approved under subsection (4) of RCW 80.80.060.*
- F. PSE contends that WAC 480.100.XXX(4) grants to all utilities the right to use a proceeding other than a general rate proceeding for consideration of recovery of costs in rates and that the Commission should adopt rules to govern such “other proceedings.”*

Northwest Energy Coalition (NVEC)

The NVEC submits two comments:

- A. NVEC recommends that WAC 480-100-XXX(2) should substitute the word “will” for the word “may” thereby requiring an electrical company to apply outside of a general rate case for a determination of whether a long-term financial commitment complies with the EPS.*
- B. NVEC recommends that the UTC rules include a definition for the term “local jurisdiction” which is used within the term “power plant” as defined by the statute. NVEC recommends that “local jurisdiction” be defined as:*

any entity in Washington state in addition to the energy facility site evaluation council that has authority for permitting electric generation

facilities, and any entity located in another state, region, or province with authority for permitting electric generation facilities.

NWEC contends that the intent of the statute was to regulate contracts for power supplies from power plants both inside and outside Washington. According to NWEC, the term “local jurisdiction” must be defined to include permitting entities outside Washington State to ensure that the effect of the statute is not limited to power facilities inside Washington State.

PacifiCorp

PacifiCorp submitted no specific comments, but says:

- A. *PacifiCorp has reviewed the proposed rules and does not have any substantive comments at this time. The Commission’s discussion draft appears to reflect the intent of SB 6001 to allow a utility to request a determination, or “pre-approval”, from the Commission as to whether a proposed long-term financial commitment complies with the EPS. Importantly, PacifiCorp respectfully requests that the Commission not perceive the absence of comments by PacifiCorp on any particular issue or other matter as a conclusive indication of PacifiCorp’s support or opposition with respect thereto. PacifiCorp acknowledges the ongoing nature of the issues in this proceeding and reserves the right to present additional comments at a future time, as necessary.*

SECOND DISCUSSION DRAFT

With the comments received on March 31, 2008, in mind, Commission rulemaking staff prepared a second discussion draft on July 9, 2008. Aside from editorial changes, principle revisions to the first discussion draft include:

- A. Proposed WAC 480-100-400 is revised to emphasize electrical companies bear the burden to prove that long-term financial commitments comply with the greenhouse gases emissions performance standard through one of two processes: a general rate case, or the review process specified in proposed WAC 480-100-400. The latter process is specifically authorized in RCW 80.80.060(5). The proposed rule states that if a utility fails to carry its burden the Commission may disallow recovery of costs, or impose other penalties authorized by law.
- B. Additional definitions are included for “electricity from unspecified sources,” “new ownership interest,” and “upgrade” – all consistent with the definitions

adopted by the Department of Ecology at WAC 173-407-110 and the Energy Facility Site Evaluation Council at WAC 463-85-110.

- C. The definition of “greenhouse gases performance standard” is modified to refer specifically to Ecology rules adopted at WAC 173-407.
- D. Proposed WAC 480-100-405 is revised to require an electrical company to include in its filing any determination made by Ecology or EFSEC regarding power plants included in the long-term financial commitment for which the company is seeking a compliance review by the commission.
- E. Proposed WAC 480-100-405 is revised to emphasize that any cost-recovery process other than a general rate case must be a process authorized by the commission.
- F. Proposed WAC 480-100-410 is revised to allow an electrical company to seek recovery of costs incurred under this section in a general rate case.
- G. Proposed WAC-100-415 is added to specify the requirements applicable to an electrical company utilizing the deferral accounting mechanism authorized under RCW 80.80.060(6)

AUGUST 5 RULEMAKING WORKSHOP

Commission staff convened a rulemaking workshop on August 5, 2008, to discuss with interested parties the second discussion draft. Notice of the workshop was given to 84 interested parties. Five entities were represented by participants at the workshop: PSE, Avista, PacifiCorp (by phone), Public Counsel, and NVEC.

PSE raised five questions in the nature of clarification regarding definitions in the discussion draft:

- 1) How will the Commission and Department of Ecology coordinate review of a utility’s compliance with the EPS?

Staff workshop response: Commission staff plans to work with staff at the Department of Ecology to coordinate these reviews. The statute (RCW 80.80.060(7)) places the obligation on the Department of Ecology to report to the Commission, consequently this issue is not addressed in the Commission’s proposed rules.

- 2) Why is “ownership interest” defined as 5 percent, rather than 51 percent?

Staff workshop response: The statute uses the term “ownership interest” rather than “ownership,” so staff concludes a minority interest was contemplated. The definition proposed is identical to the definition in the Ecology rule.

- 3) Does a change in ownership of the utility (rather than the power plant) trigger the change in ownership provision in the proposed rule?

Staff workshop response: Staff believes the definition applies to change in ownership of power facilities, not change in ownership of the entity that holds title to the power facility.

- 4) Should the definition of “base load generation” be expanded to clarify what is meant by “designed” and “intended?”

Staff response: The definition is taken from the statute. Adding specificity would limit flexibility for companies and the commission to consider particular circumstances. RCW 80.80.060(3) provides additional clarity about what the Commission should consider in applying this definition.

- 5) Are the assumptions and methods for calculating emissions from unspecified sources included in the Department of Ecology’s rules?

Staff workshop response: Yes, at WAC 173-407-300.

NWEC raised one question.

- 1) Should the definition of “power plant” be modified to clarify that power plants and local jurisdictions outside of Washington are included?

Staff workshop response: Staff is still considering this matter, but believes the best course is to adhere to, and not amplify on, the definition included in the statute.

No party participating in the workshop objected to the rules as drafted.